



STATE OF INDIANA

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March 6, 2015

Mr. William R. Groth
C/o Energy and Policy Institute
P.O. Box 15790
Washington, D.C. 20003

Re: Formal Complaint 15-FC-69; Alleged Violation of the Access to Public Records Act by Indiana House Representative Eric Koch and the Indiana House Republican Caucus

Dear Mr. Groth,

This advisory opinion is in response to your formal complaint alleging Indiana House Representative Eric Koch and the Indiana House Republican Caucus ("Caucus"), violated the Access to Public Records Act ("APRA") Ind. Code § 5-14-3-1 *et. seq.* The Caucus has responded to your complaint via Ms. Jill S. Carnell, Esq., Chief Counsel. Her response is enclosed for your review. I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on February 24, 2015.

BACKGROUND

Your complaint dated February 23, 2015 alleges the Indiana House Republican Caucus violated the Access to Public Records Act by failing to produce information you requested.

On or about January 16, 2015, you submitted a public records request to Representative Koch requesting the following information:

[c]opies of correspondence between Representative Eric Koch, Koch's staff, and Duke Energy, and Indianapolis Power & Light. The information is specifically regarding the distributed generation bill, H.B. 1320, filed by Representative Eric Koch. This public records request should include but is not limited to emails, all draft records, notes, minutes, scheduling records, text messages, other correspondence and all other records. The search for records may be limited to September 1, 2014 to January 15, 2015.

On January 20, 2015, Chief Counsel for the Caucus acknowledged and denied your request arguing that the Indiana Access to Public Records Law was inapplicable to the Indiana General Assembly based upon House tradition and the holding in *Masariu v. The Marion Superior Court No. 1*, 621 N.E.2d 1097 (Ind. 1993). The Caucus reiterated this argument in its response to your complaint.

DISCUSSION

First, it should be noted the Indiana Access to Public Records Act applies to the Indiana General Assembly. The Legislature itself wrote in Ind. Code § 5-14-3-1:

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.

Nowhere in the APRA does the statute exempt the General Assembly from its provisions. In fact, it carves out several exemptions for itself in relation to specific records. Therefore, if it does not apply, there would be no need to create exceptions. See Ind. Code §§ 5-14-3-4(b)(13) and (14) and ; 5-14-3-9.5(a) et. seq.

Furthermore, Ind. Code § 5-14-3-2(n)(1) defines public agency for the purpose of the APRA as Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name designated, exercising any part of the executive, administrative, judicial, **or legislative power of the state**.

The Caucus cites *Masariu v. The Marion Superior Court No. 1*, 621 N.E.2d 1097 (Ind. 1993) as basis for its assertion that the APRA does not apply to the General Assembly. In *Masariu*, the Indiana Supreme Court declined to insert itself into the operations of the legislative branch based upon separation of powers principles. That particular case, however, concerned the matter of whether House personnel should undertake a task and did not address any substantive APRA or Open Door Law issues. The Court did not affirmatively state whether the APRA was applicable or not, only that the Supreme Court would not interfere with internal legislative operations.

The Caucus also cites *Berry et. al. v. Crawford, et. al.*, 990 N.E.2d 410 (Ind. 2013). *Berry* held that where a particular function has been expressly delegated to the legislature by the Indiana Constitution without any express constitutional limitation or qualification, disputes arising in the exercise of such functions are inappropriate for judicial resolution. Distinguishable is the fact that access to public records and governmental transparency is

not exclusive to the legislative branch of government. As noted above in Ind. Code § 5-14-3-2(n)(1), those responsibilities apply across all levels of state and local government. Both *Masairu* and *Berry* were concerned with what is non-justiciable. This very Office was created by the Indiana Legislature in part to make recommendations regarding public access to the General Assembly. See Ind. Code § 5-14-5-10(7). I opine on matters related to the executive and legislative branches of government as well. Therefore, it is my opinion the Indiana General Assembly is subject to the Indiana Access Laws. It should also be noted the General Assembly has contemplated writing itself out of the APRA after *Masariu* (See H.B. 1083 (2001)). It declined to do so. Furthermore, the General Assembly has created specific exemptions for itself regarding work product indicating it considers itself subject to the APRA in other regards.

As for the request itself, much of what you request would fall into the legislative work product exception pursuant to Ind. Code § 5-14-3-4(b)(14). The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. See Ind. Code § 5-14-3-6(a). Some of the records you seek may be work product of a legislator exempt from disclosure under Ind. Code § 5-14-3-4(b)(14). But it remains to be seen whether the totality of the documentation is work product.

Finally, it appears as if your request is not reasonably particular, in that it does not meet the specificity requirements of Ind. Code § 5-14-3-3. In regard to email communication, please refer to the *Opinion of the Public Access Counselor 14-INF-30* for an overview of reasonable particularity in regard to emails. If resubmitted with reasonable specificity, the Caucus would need to identify the non-disclosable records containing work product and produce the information which does not contain work product.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Indiana General Assembly is subject to the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a stylized, sweeping flourish extending from the bottom left.

Luke H. Britt
Public Access Counselor

Cc: Jill. S. Carnell, Esq.